Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	
	)	
Interconnection between Local	)	CC Docket No. 95-185
Exchange Carriers and Commercial	)	
Mobile Radio Service Providers	)	

COMMENTS OF US ONE COMMUNICATIONS CORP.
ON PETITIONS FOR RECONSIDERATION

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COMMENTS OF US ONE COMMUNICATIONS CORP.
ON PETITIONS FOR RECONSIDERATION

US ONE Communications Corp. ("US ONE"),[1] by its attorneys, hereby submits its comments on the petitions for reconsideration and/or clarification of the Commission's *First Report and Order* in the above-referenced proceeding.[2]

INTRODUCTION AND SUMMARY

The *First Report and Order* is a laudable and critical first step towards opening up local phone markets to competition as mandated by Congress in the Telecommunications Act of 1996. However, as set forth more fully in a number of petitions for reconsideration and/or clarification, a number of loopholes are identified that incumbent local exchange carriers ("ILECs") are

[1] US ONE is a nationwide, start-up competitive local exchange carrier ("CLEC").

[2] *First Report and Order,* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, FCC 96-325 (rel. Aug. 8, 1996)("*First Report and Order*").

seeking to exploit or manufacture that, if left unresolved, will serve to frustrate the goals of the Act. Specifically, as set forth more fully below, US ONE supports reconsideration and/or clarification closing these loopholes in the *First Report and Order*.

First, US ONE believes that there is no legitimate policy or legal reason for excluding dark fiber as a required network element, and supports reconsideration of this issue. Second, US ONE supports clarification of the Commission's rules to make clear that cross-connects are part of the loop element and must be priced on a TELRIC basis. Third, US ONE believes that the Commission should clarify its rules on non-recurring charges to establish more specific guidelines governing ILEC conduct with respect to these charges. Fourth, the Commission should reconsider its decision to apply the same pricing standard to transport and termination as to interconnection and unbundled elements, and make clear that transport and termination charges do not include an allocation of joint and common costs. Finally, US ONE supports clarification that CLEC reciprocal compensation from a CLEC switch that has the coverage of an ILEC's tandem switch should be compensated based on the tandem rate and that the ILEC end offices be considered the point of termination for necessary transport mileage.

A. Dark Fiber is a Required Network Element.

AT&T and MCI ask the Commission to reconsider its decision deferring whether installed dark fiber must be made available on an unbundled basis.[3] In declining to address the unbundled provision of dark fiber, the Commission indicated that parties had failed to provide the Commission with sufficient information to find whether dark fiber qualifies as a network

[3] *See* AT&T Petition at 35-37; MCI Petition at 20-23.

element under Sections 251(c)(3) and 251(d)(2).[4] The Commission cites a single argument why dark fiber might not qualify as a network element – that offered by GTE that dark fiber is not "used in the provision of telecommunications service."[5] Both on legal and policy grounds, there can be no question that dark fiber qualifies as a network element, and accordingly, US ONE supports AT&T's and MCI's petitions on this point.

Section 252(c)(3) imposes a duty on ILECs "to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point . . ." The Commission does not question that dark fiber will be used by CLECs in the provision of a telecommunications service. Just as copper wire is a transmission facility used to provide voice-grade services, dark fiber is an essential transmission facility used to provide optical transmission services, such as OC-3. Nor is there any doubt about the ability to obtain access to dark fiber at a technically feasible point. Indeed, carriers routinely interconnect at the fiber facility today. Finally, there is no legitimate proprietary concerns regarding access to dark fiber.[6] On the other hand, there is significant evidence in the record that contrary to the dictates of Section 251(d)(3)(B), failure to provide access to dark fiber would impair the ability of CLECs to provide services that they seek to offer.[7] Indeed, as AT&T and MCI both point out, there are

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[4] *First Report and Order* ¶ 450.

[5] *Id.* ¶ 432.

[6] *See* Section 251(d)(2)(A). Indeed it would be difficult to fathom such concerns with respect to dark fiber, as the Commission has already concluded that no such concerns exist with respect to interoffice facilities generally, such as lit fiber. *See First Report and Order* ¶ 446; MCI Petition at 23

[7] MCI Petition at 23.

substantial and compelling public policy reasons why dark fiber should be made available to new entrants, and no policy reason whatsoever why access should be denied.

Apparently, then, the sole reason for the Commission's refusal to mandate access to dark fiber is an improper application of the meaning of "network element," which is defined by the Act, as "a facility or equipment used in the provision of a telecommunications service."[8] As AT&T notes, there are many ILEC facilities that are part of its network, which, at a particular point in time, are not being utilized by the LEC.[9] Yet, to define whether the facility is a "network element" – and hence a CLEC's right to access that facility -- based solely on what the facility is connected to at a particular point in time, would not only be grossly anticompetitive, but would lead to nonsensical circular results. For example, no network elements would ever be available to other parties because only facilities used by the LEC would be network elements. The Commission should flatly reject efforts to give an ILEC discretion to willy-nilly deny access to these facilities, yet reserve capacity for its own later use at a time of its choosing, based on the simple expedience of keeping the fiber dark until the ILEC decides to put the fiber in service.

Excluding dark fiber from the definition of network element makes little sense for yet another reason. Dark fiber is technically spare strands of fiber that are not equipped with terminating electronics. Such electronics can just as easily be provided by the customer or the LEC. It would make little legal or practical sense to parse out individual strands of fiber, leaving the others to be deemed network elements simply because the "lit" fiber have terminating

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[8] Communications Act, § 3(29).

[9] AT&T Petition at 36-37.

electronics and the "dark" fiber do not. This is especially true to the extent, as the Commission has found, that ILECs overbuild and gold plate their networks to maintain profits under rate of return regimes.[10] It would strain credulity if ILECs could simultaneously and successfully argue that dark fiber (i.e., optical transmission facilities) are not used in the provision of telecommunications service, while at the same time allowing such facilities to be included in subscriber rates for telecommunications service.

Finally, any doubt that dark fiber is used in the provision of a telecommunications service should be laid to rest by the Commission's construction of another provision of the Act, Section 103, which removes the Public Utility Holding Company Act of 1935 as a barrier to public utility holding company entry into telecommunication markets. Under this provision, holding companies may acquire an interest in an "exempt telecommunications company" ("ETC"), which is defined as an entity "engaged . . . in the business of providing telecommunications services . . ."[11]

One of the first ETC applications before the Commission involved an entity that was not providing service at the time of its application.[12] In arguing that ETC status should be denied, BellSouth urged that to meet the statutory definition for ETC status, firms must actually be currently engaged in the telecommunications business.[13] The Commission, in granting the

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[10] *See Report and Order and Second Further Notice of Proposed Rulemaking*, Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 2890 (1989)(rate regulation provides powerful incentive for carriers to pad their costs through additional investments).

[11] 1996 Act, § 103, adding § 34 to PUHCA.

[12] *Order,* Application of Entergy Technology Company for ETC Status, File No. ETC 96-2, FCC 96-163 (rel. Apr. 12, 1996).

[13] *Id. ¶ 10.*

application, rejected this argument, finding that based on the language, structure, and purpose of the section, an entity is "engaged in the business" of providing telecommunications service if it is established for the purpose of providing such service.[14] In reaffirming this decision in the Report and Order adopting ETC rules, the Commission reiterated that a contrary conclusion would be antithetical to Congress' intent in adopting the ETC provision.[15]

Here too, there can be little doubt that installed fiber that represents unused capacity on an existing telecommunications network, is used in the provision of a telecommunications service. Any other conclusion would be antithetical to Section 251's fundamental purpose to allow new entrants access to existing LEC facilities so as to provide for rapid competitive entry into and the deconcentration of local telephone markets.

B. Cross Connects Should be Part of the Loop Element and Priced on a TELRIC Basis.

MFS Communications Company ("MFS") seeks clarification that cross-connect facilities between an unbundled loop and a requesting carrier's collocated equipment is a required unbundled network element.[16] The Commission specified in the *First Report and Order* that such cross-connects must be provided by ILECs and that charges for cross-connects must meet the cost-based standard provided in Section 252(d)(1).[17] However, the Commission omitted

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[14] *Id.* ¶ 30.

[15] *Report and Order,* Implementation of Section 34(a)(1) of the Public Utility Holding Company Act of 1935, GC Docket No. 96-101, FCC 96-376, ¶¶ 28-31 (rel. Sept. 12, 1996).

[16] MFS Petition at 8.

[17] *First Report and Order* ¶ 386.

cross-connects as either a separate network element set forth in the rules or as part of the loop element.[18]

A cross-connect is necessary for a carrier's collocated equipment to access the loop[19] and the obligation to make cross connects available should be included in the rules. Accordingly, US ONE agrees with MFS that the Commission should clarify this omission. However, rather than being listed as a separate element as urged by MFS, US ONE believes that the rules should specify that the loop element includes the provision of cross-connects. This is because loops without cross-connections are not connected to anything -- i.e., loops without cross connects are useless. Moreover, like the loop itself, the rules should specify that cross-connects be provided on a TELRIC basis.

C. The Commission Must Ensure that ILECs Cannot Charge Unsupported and Anticompetitive Non-Recurring Charges.

In its petition for reconsideration, AT&T chronicles numerous abuses by independent local exchange carriers involving one-time, non-recurring charges.[20] In addition, US ONE has performed financial analyses that indicate that non-recurring charges are one of the primary determinants of whether local entry is profitable or unprofitable.[21] The *First Report and Order* attempts to address this problem through the adoption of rules that, in general terms, require that non-recurring charges be allocated efficiently among requesting carriers and that such charges

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[18] *See* 47 C.F.R. § 51.319.

[19] *See First Report and Order* ¶ 386.

[20] *See* AT&T Petition at 8-10.

[21] Rafferty, Local Entry Cost Model, unpublished (1996).

not permit ILECs to recover more than the total forward-looking economic cost of providing the applicable element.[22]

US ONE agrees with AT&T that the Commission needs to give more content to these rules. Thus, the Commission must ensure that ILECs do not attempt to use exorbitant and unreasonable one-time charges as a back-door way to erect near limitless entry barriers to CLEC entry, which must await case-by-case adjudication in interconnection arbitrations or Commission complaint proceedings. Accordingly, US ONE supports AT&T's request that the Commission clarify its *First Report and Order* by setting forth a number of more specific guidelines governing ILEC conduct with respect to the imposition of non-recurring charges.

D. The Statutory Reciprocal Compensation Standard for Transport and Termination Does Not Include an Allocation of Joint and Common Costs.

Teleport Communications Group ("TCG") and the National Cable Television Association ("NCTA") seek reconsideration of the Commission's adoption of the same pricing methodology covering charges for interconnection and the provision of network elements as for the transport and termination of traffic.[23] US ONE applauds the Commission's development and use of Total Element Long Run Incremental Cost ("TELRIC") for interconnection and unbundled elements. However, as TCG and NCTA correctly note, the pricing standard governing interconnection and the provision of network elements, which is set forth in Section 252(d)(1), differs significantly from the pricing standard governing transport and termination of traffic, which is contained in Section 252(d)(2).

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[22] *See* 47 C.F.R. § 51.507(e).

[23] *See* Teleport Petition at 6-10; NCTA Petition at 12-14.

Section 252(d)(1) is a TELRIC standard that provides that the charges may also include a reasonable profit on, arguably, long run joint and common costs. The Commission found that the prices competitive providers pay for interconnection and unbundled elements should reflect forward looking economic costs, rather than historic, embedded costs. The Commission thus established TELRIC, which includes a reasonable allocation of forward-looking joint and common costs, as the appropriate pricing methodology for interconnection and unbundled elements.

In contrast, Section 252(d)(2) is a marginal cost standard. It requires that reciprocal compensation for termination and transport provide for the recovery of those costs associated with the transport and termination of calls originating on another carrier's network, determined "on the basis of a reasonable approximation of the additional costs of terminating such calls." In imposing this marginal cost standard for transport and termination, Congress recognized that transport and termination volume does not affect the receiving carrier's fixed costs or its joint and common costs and that these costs should be excluded from the charges for transport and termination.

This is hardly surprising, and is part of Congress' overall scheme that establishes different pricing standards for the provision of different types of services and facilities. Transport and termination services are necessary for subscribers on a CLEC network to reach ILEC subscribers, and vice versa, and serve a very different purpose than interconnection and the provision of unbundled elements. Both because each carrier is mutually benefited by such reciprocal arrangements and termination costs are primarily traffic sensitive, it makes perfect

sense to exclude an allocation of joint and common costs from transport and termination charges. To do otherwise, ignores the plain language of the statute and the intent of Congress.

E. Prohibitions on Placing Switching Collocation Cages Requires that the CLEC Transport and Termination Compensation Fully Mirror the TELRIC-Based ILEC Transport and Termination Charge Based on Switched Coverage Areas

US ONE fully supports MFS's position that CLEC transport and termination should be the mirror image of that of the ILECs.[24] That is, CLEC reciprocal compensation from a CLEC switch that has the coverage of an ILEC's tandem switch should be compensated based on the tandem rate and the same transport mileage, if any, to the termination point for each call. This "mirror-image" approach recognizes that there is a suboptimal trade-off that CLECs must make between switching and transmission that ILECs do not.

As the Commission is aware, by increasing the number of switches in a network, the amount of transmission can be reduced, and vice versa. Given the constraints placed on CLECs by the ILECs, each CLEC has made a basic design decision as to what its switch/transmission tradeoff must be given that constraint. A major suboptimizing design constraint placed on CLECs is that they are not allowed to physically deploy end office switching where it is most efficiently called for -- at the end of the unbundled loops. Specifically, the ILECs have imposed (and will continue to impose) a prohibition on CLEC placement of switches and/or switch remotes in collocation cages. This has effectively prohibited a CLEC from deploying an efficient end office/tandem network architecture, whereby the end offices are the ends of the local loops. Instead, CLECs are forced to place expensive transmission equipment in their collocated cages and use that transmission capacity to backhaul their loops to one or more central

[24] MFS Petition at 25-28.

office switches (which often cover the entire LATA). The only reason the centralized CLEC switches have local loops connected to them -- which give them end office functionality -- is because CLECs are unable to place remote switching and smaller switching machines in each collocation cage -- closer to the end of the ILEC's unbundled local loop.

The end result is that suboptimal CLEC network designs are more heavily transmission oriented, as compared to switch oriented. In contrast, the ILEC has a more even balance between switching and transmission -- resulting in the appearance of numerous end offices hubbing off a central tandem in order to cover the entire LATA. Thus, it is reasonable to conclude that if the CLEC were free to place end office switching in each collocation cage, the CLEC's network would have a transmission/switching tradeoff in design that is more closely aligned with that of the ILEC -- a CLEC end office at the end of each loop without the need for loop backhaul.

If the Commission were to allow ILECs to pay compensation to CLECs based upon their suboptimized transmission-intensive network (or alternatively characterized as "switching deficient"), the CLECs would be double penalized. In addition to being forced to have a suboptimal network design by the ILEC's refusal to allow switching in cages, the CLECs would receive compensation for only their one central switch as if it were servicing only as a single end office switch. At the same time, CLECs would receive little or no compensation for the excess transmission (including transmission equipment) that the CLEC's network is burdened with in order to back-haul local loops in a way that the ILEC's network simply does not have to. An allegedly "reciprocal compensation" scheme, such as that advocated by Local Exchange Carrier Coalition, that involves ILEC network rate elements (i.e., tandem and end office switching)[25]

[25] *See* LECC Petition at 14-15.

simply cannot reflect actual CLEC long run costs because the CLEC is simply not allowed (and will not be allowed as long as switching is barred from cages) to optimize the trade-off of switching and transmission, as the ILEC can and will continue to enjoy.

In sum, because CLECs do not have the freedom to design the optimal trade-off between end office switching/tandem switching/transmission, an ILEC rate-element based structure that is based on the long run optimization of those three elements simply cannot be fairly or economically applied to the constrained CLEC networks. The only alternative left is that urged by MFS. That is, the ILEC's rate structure applied to the ILEC network's topographical structure (i.e., its tandem, end office, and transmission configurations and their respective geographical placement and coverage) should be the basis for CLEC reciprocal compensation. Applying this general approach to the specifics here, if the ILEC hands off traffic to a CLEC switch and that switch has the coverage of an ILEC tandem switch, then the CLEC should be compensated for transporting and terminating that traffic at the ILEC's tandem compensation rate. Any transport mileage collected by the CLEC should be based on the distance between the physical meet point and the terminating ILEC rate center for each transported and terminated call -- just as it would be for ILEC transport and termination.

CONCLUSION

US ONE respectfully requests that the Commission reconsider and/or clarify those discrete aspects of its *First Report and Order* set forth above.

Respectfully submitted,

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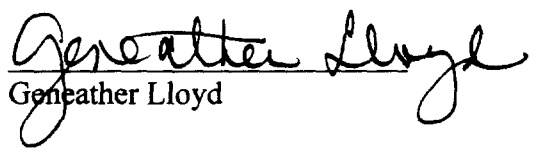
CERTIFICATE OF SERVICE

I, Geneather Lloyd, do hereby certify that copies of the foregoing Comments of US ONE Communications Corp. on Petitions for Reconsideration have been served via First Class Mail, postage prepaid or by hand-delivery on this 31st day of October, 1996.



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